UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

THE OCEAN NATIONAL BANK OF KENNEBUNK,	)	
Plaintiff	)	
v.	)	***Docket No. 97-244-P-C***
NATIONWIDE MONEY SERVICES, INC., et al.,	)	
Defendants	)	

RECOMMENDED DECISION ON PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT AND TO STRIKE AFFIRMATIVE DEFENSES

The plaintiff, The Ocean National Bank of Kennebunk ("Ocean"), seeks summary judgment on its complaint against the defendants, Nationwide Money Services, Inc. ("Nationwide") and Cardservice International, Inc. ("CSI"), arising out of certain contractual agreements. Plaintiff's Motion for Summary Judgment on Complaint ("Summary Judgment Motion on the Merits") (Docket No. 11). Apparently as a backup position, Ocean seeks summary judgment on certain affirmative defenses asserted by the defendants and asks the court to strike the remaining affirmative defenses. Motion to Strike Affirmative Defenses and for Partial Summary Judgment ("Affirmative Defenses Motion") (Docket No. 12). I recommend that the court grant in part and deny in part the motion to strike and for summary judgment on the affirmative defenses and that it deny the motion for

summary judgment on the merits.[1]

I. Applicable Legal Standards

A. Motion to Strike

"A motion to strike under Rule 12(f) is the appropriate remedy for the elimination of redundant, immaterial, impertinent, or scandalous matter in any pleading, and is the primary procedure for objecting to an insufficient defense." 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1380 (2d ed. 1990) at 644. Motions to strike are disfavored and are to be granted only if the defense is legally insufficient and presents no question of law or fact that the court must resolve. *Nelson v. University of Maine Sys.*, 914 F. Supp. 643, 646-47 (D. Me. 1996). The general rule is that the court should not consider matters outside the pleadings in evaluating a motion to strike and that it must treat all well-pleaded facts as admitted. *FDIC v. S. Prawer & Co.*, 829 F. Supp. 439, 450 n.12 (D. Me. 1993).

B. Summary Judgment

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve

[1]The defendants have requested oral argument on the pending motions. Docket No. 24. In my opinion, the written submissions of the parties are sufficient for fully and fairly resolving the issues raised. Therefore, the request for oral argument is denied. *See* Loc. R. 7(f).

the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following facts are undisputed and appropriately supported in the summary judgment record. In June 1994 Ocean and Nationwide entered into an agreement entitled "Nationwide Money Service ATM Sponsorship Agreement ("Sponsorship Agreement")." Exh. A to Complaint (Docket No. 1). In October 1995 Ocean, Nationwide and CSI entered into two agreements simultaneously: (i) an agreement entitled "ATM Cash Services Agreement ("CSA")," Exh. B to Complaint, and (ii) an agreement entitled "ATM Cash/Cash Services Agreement ("the Six-Month Agreement")," Exh. C to Complaint. In January 1996 Nationwide agreed to pay Ocean a certain fee for each cash withdrawal from "a network into which you have sponsored [Nationwide]." Letter dated January

2, 1996 from John J. O'Toole, Jr. to Terrance L. Beers, Exh. 12 to Defendants' Consolidated Statement of Material Facts Filed in Support of Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment and for Summary Judgment of Complaint [sic] ("Defendants' SMF") (Docket No. 19). By signatures dated May, July, and August 1996 the parties entered into an addendum to the CSA ("Addendum"). Exhs. E & F to Complaint,.

The complaint alleges that the defendants have breached the CSA. The CSA provides that Ocean will perform "all administrative functions . . . to include settlement, adjustments and reporting, and to also include maintaining the cash levels" of automated teller machines ("ATMs") "which are the subject of this Agreement." CSA at 3. The CSA applies to all ATMs subject to the Six-Month Agreement and to "other ATM's [sic] deployed by [Nationwide/CSI], which ATM's [sic] shall be owned, maintained, repaired and/or replaced by [Nationwide/CSI]." *Id*. at 2. Under the CSA, Nationwide and CSI agree to perform daily electronic reconciliation of the ATMs and to credit Ocean with $0.08 (eight cents) for every transaction at an ATM subject to the agreement, with the exception of transactions that do not generate revenue to Nationwide or CSI. *Id.* at 3-4. The CSA has a term of five years with Ocean holding an option to renew it for three additional five year terms. *Id.* at 5. The Six-Month Agreement provides that Nationwide or CSI will place ATMs at up to 33 locations to be listed on Exhibit A.[2] Six-Month Agreement at 2. The addendum to the CSA amends page 1, paragraph 6 of the CSA to allow Nationwide and CSI "or their designees to supply cash to the ATMs." Addendum at 1 (emphasis in original).[3]

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[2] Exhibit A is not included in any of the copies of the Six-Month Agreement that have been provided to the court.

[3] The information in this paragraph is taken from the documents themselves. The parties (continued...)

Ocean alleges that the defendants have failed to any payments under the CSA since January 1997. Affidavit of Terrance L. Beers in Support of Motion to Strike Affirmative Defenses and for Partial Summary Judgment on Complaint ("Beers Aff."), attached to Plaintiff's Consolidated Statement of Uncontested Facts, etc. ("Plaintiff's SMF") (Docket No. 13), ¶ 10. The parties also disagree about which ATMs are subject to the CSA, and whether that dispute has been resolved by a subsequent agreement among the parties.

III. Discussion

A. Affirmative Defenses

The answers of both defendants assert the same 22 affirmative defenses. Ocean moves to strike the affirmative defenses numbered 1 (failure to state a claim upon which relief may be granted); 2 (fault of others); 6 (unclean hands); 8 (statute of limitations); 12 (adoption of all defenses pleaded by other defendant); 13 (failure of consideration); 16 (laches); 17 (lack of causation); 18 (novation); 20 (statute of frauds); and 21(unjust enrichment). Ocean seeks summary judgment on the remaining affirmative defenses: 3 (failure to mitigate damages); 4 (estoppel); 5 (set-off); 7 (waiver and release); 9 (excuse); 10 (ratification); 11 (impossibility of performance); 14 (condition precedent); 15 (impracticability of performance); 19 (accord and satisfaction); and 22 (material breach).

In their objection to the Affirmative Defenses Motion, the defendants present argument

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[3](...continued)
have disputed virtually every entry in each other's statements of material fact submitted pursuant to Local Rule 56 in support of and in opposition to the motions for summary judgment. *See* Docket Nos. 19 & 35. The only point of agreement appears to be that the documents speak for themselves.

concerning only five of these affirmative defenses, numbers 1, 3, 5, 13, and 19. Therefore, as to that part of the motion that seeks to strike certain affirmative defenses, they have waived any objection concerning affirmative defenses numbers 2, 6, 8, 16, 17, 18, 20 and 21 and the motion should be granted as to those defenses.[4] Local Rule 7(b); *see Cuttle v. Federal Employees Metal Trades Council*, 623 F. Supp. 1154, 1155 (D. Me. 1985) (motions other than those for summary judgment automatically granted for lack of objection).

The contested affirmative defenses that the plaintiff seeks to strike are numbers 1 (failure to state a claim) and 13 (failure of consideration). Ocean argues that the first affirmative defense is legally insufficient because its action is one for breach of contract and the complaint clearly states such a claim. The defendants respond by asserting that the fact that they have not breached the CSA is apparent from the face of the document and therefore the complaint fails to state a claim upon which relief may be granted. This argument goes much too far. When an affirmative defense is subject to a motion to strike the issue is not whether the defendant will ultimately prevail but only whether the defense is legally sufficient. Indeed, the court cannot go beyond the pleadings in ruling on a motion to strike. The existence of a breach, or the lack of a breach, of a contract cannot be determined from the pleadings alone. Dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted is appropriate only if it clearly appears that the plaintiff cannot recover on an viable theory. *Garita Hotel Ltd. Partnership v. Ponce Fed. Bank, F.S.B.*, 958

[4] The plaintiff requests the court to sanction the defendants by requiring them to pay the plaintiff's attorney fees and costs incurred in connection with the motion to strike and for summary judgment on the affirmative defenses because they have not provided any justification for seventeen of the twenty-two defenses asserted in their answers. I deny the request, but that denial should not be taken as approval of the practice of wholesale assertion of affirmative defenses, some of which clearly have no relevance to the allegations in the complaint.

F.2d 15, 17 (1st Cir. 1992). The complaint in this case states a claim upon which relief may be granted. Ocean's motion to strike the first affirmative defense should be granted.

With respect to the thirteenth affirmative defense, Ocean contends that the defendants have admitted the existence of a contract in paragraph 10 of their respective answers. Since lack of consideration is a defense to the formation of a contract, Ocean asserts, it is inconsistent with an admission that the CSA is a contract and the defense should thus be stricken. The defendants respond that the defense is asserted only as to the 1996 addendum to the CSA. Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Strike Affirmative Defenses and for Partial Summary Judgment ("Defendants' Opposition") (Docket No. 18) at 8-9. The complaint does not allege any breach of the addendum. Therefore, the affirmative defense is irrelevant and should be stricken.

The fact that the defendants have not objected to the plaintiff's request for summary judgment on their affirmative defenses numbers 4, 7, 9, 10, 11, 14, 15 and 22 means that they have are deemed to have consented to the plaintiff's statement of facts concerning those defenses to the extent that it is supported by appropriate record citations. *Redman v. FDIC*, 794 F. Supp. 20, 22 (D. Me. 1992). In this posture, the court must examine the merits of the motion as to these defenses even in the absence of objection. *Id.*

The fourth affirmative defense asserts estoppel. Under Maine law, a party asserting estoppel must show, *inter alia*, that it relied on misleading acts or omissions of the other party which induced it to do that which it would not otherwise have done. *E.g., Maine Mut. Fire Ins. Co. v. Grant*, 674 A.2d 503, 504 (Me. 1996). Here, the defendants have offered no evidence of any misleading conduct by the plaintiff. Summary judgment on affirmative defense number 4 is therefore appropriate. *FDIC*

v. Rusconi, 808 F. Supp. 30, 37 n.14 (D. Me. 1992) (lack of evidence or argument in support of affirmative defenses constitutes waiver).

The defendants offer no evidence in support of their seventh affirmative defense, waiver and release. The complaint alleges breach of the CSA, which requires by its terms that any release or discharge of obligations under the agreement be in writing. CSA, ¶ 9(a). There is no document in the summary judgment record that could conceivably serve to suggest that Ocean agreed to forego any claim for breach of the CSA. The defendants point to no other evidence to support this claim. Ocean is entitled to summary judgment on affirmative defense number 7.

Affirmative defense number 9 asserts that Ocean has "expressly and/or impliedly, or by operation of law, excused" the defendants from all obligations relating to all causes of action alleged in the complaint. Answer, Affirmative Defenses and Jury Demand of Defendant Cardservice International, Inc. ("CSI Answer") (Docket No. 3) at 7-8; Answer, Affirmative Defenses and Jury Demand of Defendant Nationwide Money Services, Inc. ("Nationwide Answer") (Docket No. 7) at 7-8. The defendants offer neither evidence nor argument in support of this defense. There is no evidence in the summary judgment record that suggests any such action by Ocean. The court will not attempt to guess how Ocean might have excused the defendants "by operation of law." Ocean is entitled to summary judgment on affirmative defense number 9.

The tenth affirmative defense is similar to the seventh and ninth in that it asserts that Ocean "both expressly and impliedly . . . directed, ordered, approved, authorized, participated in and/or ratified" each defendant's conduct "and the acts and transaction complained of." CSI Answer at 8; Nationwide Answer at 8. Again, the defendants offer no evidence in support of this essentially fact-based affirmative defense. In the absence of any disputed issue of material fact, Ocean is entitled

to summary judgment on affirmative defense number 10.

Affirmative defense number 11 asserts impossibility of performance. Affirmative defense number 15 asserts impracticability of performance. As Ocean correctly points out, these defenses are variants of the same doctrine. Restatement (Second) of Contracts § 261 (Discharge by Supervening Impracticability"). Once again, the defendants do not offer any evidence to support this allegation that some action or inaction by Ocean rendered their performance under the CSA either impossible or impracticable. Ocean is entitled to summary judgment on affirmative defenses numbers 11 and 15.

The fourteenth affirmative defense asserts that Ocean failed to perform unspecified obligations that were a condition precedent to the performance of the defendants' obligations. The defendants in their response to Ocean's motion for summary judgment on this defense have not identified the obligations that Ocean supposedly failed to perform, nor have they offered any evidence or argument in support of the defense. As a result, there are no disputed issues of material fact with regard to affirmative defense number 14, and Ocean is entitled to summary judgment on that affirmative defense.

Affirmative defense number 22 contends that Ocean's action is barred by its own breach of "any and all contracts it may have had with any Defendant." CSI Answer at 10; Nationwide Answer at 10. Again, the defendants have submitted no evidence of any such breach by Ocean in connection with their opposition to the motion for summary judgment. They do "dispute" the assertion in Plaintiff's SMF that Ocean has performed all of its obligations under the CSA to the extent possible, Defendants' SMF at 3 ¶ 6, but that "dispute" is based on paragraph 10 of the Affidavit of Mike Dodak ("Dodak Aff.") (Docket No. 21), a paragraph which purports to present comments on the

Beers Affidavit and does not present any evidence of breach by Ocean. In the absence of a showing of specific facts demonstrating a trialworthy issue on this affirmative defense, on which the defendants bear the burden of proof, Ocean is entitled to summary judgment on affirmative defense number 22.

The contested affirmative defenses on which the plaintiff seeks summary judgment are numbers 3 (failure to mitigate damages), 5 (set-off), and 19 (accord and satisfaction). Numbers 3 and 5 deal with damages; only number 19 goes to liability. With regard to number 3, Ocean argues that the doctrine of mitigation is not applicable to this case because there are no reasonable measures which it could have taken to avoid or prevent its alleged loss, citing *Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722, 724 (Me. 1983). In response, the defendants appear to argue that the agreed price per transaction payable to Ocean under the CSA is unfair, given Ocean's interpretation of that document. Defendants' Opposition at 12. This cannot be construed as an argument that Ocean has failed to mitigate its damages. On the showing made, Ocean is entitled to summary judgment on the affirmative defense of failure to mitigate damages.

Ocean argues that it is entitled to summary judgment on the affirmative defense of set-off (number 5) because the defendants have not filed a counterclaim, there is no statute authorizing set-off in contract actions, and Ocean has not improperly retained any of the defendants' funds. The latter assertion is factual and is not included in Ocean's statement of material facts. It therefore will not be considered further in connection with the motion for summary judgment. *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995). The defendants respond that they "have recently become informed that Ocean may have overcharged Defendants" for its services under the CSA and that "the costs charged by Ocean to administer [certain ATMs] may be excessive." Defendants' Opposition at 10. It is not

clear how these assertions are relevant to a breach of contract claim in which the price to be paid for services is set by the contract, but in any event, the defendants admit that they "do not have any specific evidence with regard to such allegation," *id.*, and this admission is fatal to their affirmative defense under the circumstances.

The defendants assert that they intend to pursue discovery on this issue and that Fed. R. Civ. P. 56(f) therefore bars the entry of summary judgment. To the contrary, Rule 56(f) very clearly allows the court to deny a motion for summary judgment or to order a continuance to allow further discovery only when the party invoking this subsection of the rule states by affidavit the reasons why facts essential to justify its opposition cannot be presented without further discovery. The defendants' presentation makes no effort to comply with Rule 56(f). *See Resolution Trust Corp. v. North Bridge Assoc., Inc.*, 22 F.3d 1198, 1203 (1st Cir. 1994). In the absence of evidence of any disputed issue of material fact, Ocean is entitled to summary judgment on affirmative defense number 5.

The remaining affirmative defense at issue is number 19, accord and satisfaction. Ocean contends that the CSA, by its terms, may only be released or discharged by a written instrument and that no such instrument exists. It also relies on the conclusory assertion of its senior vice-president that "[t]here has been no accord and satisfaction as to [Ocean's] causes of action against Defendants." Beers Aff. ¶ 18. However, this factual assertion is not included in Ocean's statement of material facts and, as previously noted, cannot therefore be considered in connection with its motion for summary judgment. *Pew*, 161 F.R.D. at 1. The defendants offer the January 1996 letter from O'Toole to Beers as written evidence of an accord and satisfaction. They assert that this "Merchant Agreement" was intended by the parties to resolve that portion of Ocean's claim that the

defendants were breaching the CSA that relates to "the ATMs that were originally the subject of the separate Cash Agreement [the Six-Month Agreement]." Defendants' Opposition at 11. Ocean understandably disputes this factual assertion, but that is the essence of a dispute of material fact that cannot be resolved on summary judgment. The letter is undeniably in writing. Based on the parties' submissions on this issue, Ocean is not entitled to summary judgment on the affirmative defense of accord and satisfaction.

B. Summary Judgment on the Merits

Because the defendants have asserted the affirmative defense of accord and satisfaction to any allegations of breach of the CSA relating to the ATMs that were originally the subject of the Six-Month Agreement and there exists a disputed issue of material fact on this issue, summary judgment is not available to Ocean on that aspect of its claim. The claim also reaches "all ATMs deployed by [Nationwide/CSI] throughout the United States." Complaint, ¶ 10. The parties' dispute centers on language found in paragraph 1 on page 2 of the CSA:

> This Agreement shall pertain to all ATM's which are the subject of [the Six-Month Agreement] (as of the expiration date of said separate Agreement) and other ATM's [sic] deployed by [Nationwide/CSI], which ATM's [sic] shall be owned, maintained, repaired and/or replaced by [Nationwide/CSI]. . . . As to any new ATM's [sic] deployed by [Nationwide/CSI] within any Network in which [Ocean] has the ability to participate after the effective date of commencement of this Agreement, the same shall become subject to the terms of this Agreement (unless the same shall be subject to the [Six-Month Agreement]) automatically upon their deployment unless [Ocean] shall decline to accept any particular ATM under this Agreement . . . .

Ocean claims that the defendants have not accounted to it for transactions at ATMs "throughout the United States" that it asserts are subject to this Agreement. Complaint ¶¶ 10, 19.

The defendants contend that the CSA actually applies only to those ATMs to which the

defendants, or parties "specifically designated by Defendants," have supplied their own cash. Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment on Complaint (Docket No. 17) at 2. This argument is based on language in the fifth paragraph of the preamble to the CSA, on page 1, which provides that "[Ocean] is willing to enter into [the Six-Month Agreement], but only in the event that [Nationwide/CSI] enter into this Agreement with [Ocean] whereby [Nationwide/CSI] would supply its own cash to such ATM's [sic] to be deployed by [Nationwide/CSI] throughout the United States," and in paragraph 2 of the CSA on page 3 in which Ocean agrees "to perform all administrative functions relating to the ATM's [sic] of [Nationwide/CSI] which are the subject of this Agreement . . . said administrative functions and duties to include . . . maintaining the cash levels of said ATM's [sic] with cash to be supplied by [Nationwide/CSI]." Unfortunately, the defendants have neglected to include in their statement of material facts any indication whether any ATMs were deployed by them other than those subject to the Six-Month Agreement,[5] whether they deployed any ATMs after the effective date of the CSA, or whether they supplied their own cash to any such machines.[6] The plaintiff similarly cites to no evidence in the summary judgment record establishing that the defendants actually deployed any

[5] The record does contain evidence of the possible existence of other Nationwide ATMs in Exhibit 12, the so-called "Merchant Agreement," but Ocean's senior vice president testified that "the understanding was that this represented a unique group of additional machines independent of the intent of the initial agreement." Transcript of Deposition of Terrance Beers, submitted with Defendants' SMF, at 109. Ocean thus cannot be basing its claim upon the existence of these ATMs.

[6] The defendants do assert that, since entering into the addendum to the CSA, Nationwide "has never designated any third party cash supplier for Plaintiff's services." Dodak Aff. ¶ 7. This statement does not address the question whether the defendants themselves provided cash to any ATMs or whether they or any designee did so before the addendum was executed. The CSA says nothing about supplying cash "for Ocean's services." The defendants simply assert, in conclusory fashion, that they have fulfilled their obligations under the CSA.

ATMs other than those subject to the Six-Month Agreement.

Under Maine law, the interpretation of a contract is a question for the factfinder "only if the court first determines that the contract is ambiguous, a question of law." *Golden Rule Ins. Co. v. Atallah*, 45 F.3d 512, 516 (1st Cir. 1995); *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995). A contract should be construed viewing it as a whole. *Bartley v. Eastern Maine Med. Ctr.*, 617 A.2d 1020, 1022 (Me. 1992). "Contract language is ambiguous when it is reasonably susceptible to different interpretations." *Kandlis v. Huotari*, 678 A.2d 41, 43 (Me. 1996).

Ocean argues that the CSA is not ambiguous. Its assertion that the language concerning the defendants supplying their own cash to the ATMs was intended to differentiate the "other" ATMs to which the CSA referred from those subject to the Six-Month Agreement, for which Ocean would provide the cash, is appealing, but that is not the only conclusion that may be drawn from the language. Similarly, it is likely that Ocean would not have chosen to enter into an agreement that the defendants could totally avoid simply by being careful not to put their "own" cash into the ATMs they deployed. It is further difficult to understand how cash would get into those ATMs if the defendants did not "designate" someone to provide it. Nonetheless, at this stage of the proceedings and on this summary judgment record, the court's focus must be solely on the language of the CSA.

Standing alone, the language in the CSA upon which Ocean relies does not appear ambiguous. That language provides that the agreement applies to all ATMs deployed by the defendants. However, the contract must be viewed as a whole when the issue of ambiguity is raised. The language upon which the defendants rely is susceptible of more than one interpretation. In addition to the interpretation pressed by the defendants, the language at page 1 may also be construed to require the defendants to supply their own cash to the ATMs they deploy throughout the United

States, as a condition of Ocean's willingness to enter into the agreement. Similarly, the defendants point to language at page 3 of the CSA which can be construed as requiring the defendants to supply the cash that Ocean would use to maintain certain levels of cash in each ATM. This construction of the language upon which the defendants rely is entirely compatible with Ocean's interpretation of the CSA language that specifically describes the ATMs subject to the CSA as ATMs deployed by the defendants throughout the United States, without further relevant limitation.

However, I cannot conclude as a matter of law that the language of the CSA, as a whole, is not reasonably susceptible of different interpretations. It is not the role of the court to evaluate the relative reasonableness of the interpretations offered by the parties. Having found the language to be ambiguous, the court must leave the interpretation of that language to the factfinder. *McCarthy v. U.S.I. Corp.*, 678 A.2d 48, 51-52 (Me. 1996). Similarly, the defendants' assertion that the language of the CSA, if ambiguous, must be construed against Ocean because Ocean's attorney drafted it, necessarily invokes factfinding. Ocean disputes the defendants' assertion that its counsel drafted the CSA. Under the circumstances, Ocean is not entitled to summary judgment.[7]

[7] In reaching this conclusion, I have not relied on those paragraphs of the Beers Affidavit to which the defendants object. Defendants' Evidentiary Objections to Affidavit of Terrance L. Beers (Docket No. 23). That objection is thus rendered moot. The defendants have also objected to the plaintiff's Motion for Leave to File Reply Memoranda in Excess of Seven (7) Pages and for Leave to File Additional Affidavits (Docket No. 31), on the grounds that there is no good cause for the request. Defendants' Opposition to Plaintiff's Motion to File Reply Memoranda in Excess of Seven Pages and for Leave to File Additional Affidavits (Docket No. 39). The opposition, stripped of its intemperate language, essentially contends that the reply memorandum impermissibly introduces new legal arguments and facts. My review of the reply memorandum (Docket No. 30) does not support this interpretation and the motion is granted as to the reply memorandum. I do not rely in reaching my recommended decision on the affidavit of Kelvin Worthley (Docket No. 32) and the supplemental affidavit of Terrance Beers (Docket No. 33), and the objection is therefore moot as to those documents.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's Affirmative Defenses Motion be **DENIED** as to the affirmative defense of accord and satisfaction asserted in the answers of both defendants and otherwise **GRANTED**. I further recommend that the plaintiff's Summary Judgment Motion on the Merits be **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 23rd day of April, 1998.

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David M. Cohen
United States Magistrate Judge.